Supreme Court of the United States

OCTOBER TERM, 1939

No. 8

ZIFFRIN, INCORPORATED - - - - Appellant,

vs.

JAMES W. MARTIN, Commissioner of Revenue of the Commonwealth of Kentucky, et al. - - - - - - - - - Appellees.

BRIEF FOR APPELLEES

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Commonwealth v. One Dodge Motor Truck, 326 Pa. 120, 191 Atl. 590.

Jackson v. Cravens, 235 Fed. 212.

Clason v. Ind., 306 U. S. 439, 83 L. Ed. (Adv. Ops.) 599.

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BRIEF FOR APPELLEES

Reference to Official Report of Opinion Below.

The opinion of the specially constituted Statutory Three-Judge Court, sitting as the United States District Court for the Eastern District of Kentucky, delivered below, and being the only opinion delivered by the Court below, is officially reported under the style, *Ziffrin, Inc.* v. *Martin, et al.*, in 24 Fed. Supp. 924.

Grounds Upon Which Jurisdiction of This Supreme Court of the United States Is Invoked.

Jurisdiction of this Court is invoked under *Judicial Code*, §§238 and 266, *U. S. C.* Title 28, §§345 and 380, respectively, on the ground that this is a direct appeal from

the final judgment and decree of a Statutory Three-Judge Court, sitting as the District Court of the United States for the Eastern District of Kentucky (R. 65, 71), denying appellant—after notice and hearing (R. 32, 64, 65, 66)—both an interlocutory and a permanent injunction (R. 67, 68) suspending and restraining the enforcement, operation, and execution of the Kentucky Alcoholic Beverage Control Law by restraining the action of public officers of Kentucky in the enforcement and execution thereof. However, a temporary injunction pending this appeal was granted. (R. 68.)

As this Court has already overruled appellees' motion and statement opposing jurisdiction and further in view of the fact that all pertinent facts are set forth in the statement of case (immediately following), appellees beg leave to omit restating these facts in the interests of brevity.

STATEMENT

The appellant, Ziffrin, Incorporated, an Indiana corporation, and an authorized contract carrier, comes before this Court questioning the constitutionality of certain provisions of the Alcoholic Beverage Control Law of 1938 (Baldwin's 1938 Kentucky Statute Supplement, Section 2554b-97 et seq., Acts of 1938, Chapter 2), which Act was passed by the Kentucky General Assembly in its 1938 Regular Session and became effective when signed by Governor A. B. Chandler, March 7, 1938, under an emergency clause.

It is claimed that certain provisions of said Act violate (a) the Commerce Clause, *Article 1, Section 8, Clause 3,* (b) *the due process clause of the Fourteenth Amendment,* (c) *the equal protection clause of the Fourteenth Amendment,* because these provisions prohibit all transportation to or from premises in Kentucky of more than three (3) gallons of distilled spirits or wine except by a licensee thereunder,

or a railroad or railway express company. A license to transport distilled spirits and wine by truck for hire to or from premises in Kentucky which includes the receiving of such liquors for transportation is provided, but the holding of a common carrier's certificate is a prerequisite to the issuance of such a license. It is against this provision that the appellant makes its stand.

Before quoting these questioned sections, we should first like to show the intent and purpose of this "Control Law."

The title to this Alcoholic Beverage Control Law of 1938 reads as follows:

> "AN ACT providing for the regulation of the manufacture of and traffic in alcoholic beverages; requiring licenses therefor and fixing the amounts of license fees; creating Kentucky State Alcoholic Beverage Control Board, with appropriate powers for the enforcement of this Act; fixing the compensation of members of said Board and employees to be appointed by it; authorizing the issuance, revocation and suspension of licenses; imposing prohibitions, restrictions and regulations and fixing penalties for violations of this Act; empowering counties, and cities of the first, second and third classes, to have local alcoholic beverage administrators with appropriate powers to adopt and enforce restrictions and regulations of the alcoholic beverage traffic in such city or county, in conformity with this Act; to issue local licenses and fix the fees therefor, to revoke same, and to impose local regulations and penalties, not inconsistent with this Act; transferring the functions and resources of the Division of Alcoholic Control in the Department of Business Regulation to the Department of Revenue; repealing certain sections of Carroll's Kentucky Statutes, 1936 edition, and all inconsistent laws; and declaring an emergency to exist."

An examination of this Act will disclose that it is a comprehensive law designed to control alcoholic beverages from their manufacture or importation until their use or exportation.

As to intoxicating liquors, the Commonwealth of Kentucky is in rather a unique position among the various states. Kentucky's problems of control are not the same as those problems which confront other states. The official report issued by the Treasury Department of the United States shows that Kentucky produced 40.5% (41,671,416 gallons) of the whiskey manufactured in the country in the fiscal year 1938.* In addition to that, millions of gallons of intoxicating liquors are stored in this State.† Thus Kentucky's main problem of control is not to keep whiskey from being illegally imported so much as it is to prevent the illegal diversion into illegal channels of part of this enormous stock of intoxicating liquors now within the bounds of the State. Great quantities of these liquors are transported by truck, and if that whiskey which is supposedly consigned to either domestic or out-of-state dealers happens to find its way into illegal fields in Kentucky, it utterly breaks down any measures this State has erected to protect its citizens against the evils of illegal traffic in these liquors.

Intoxicating liquors have a "Jekyll-Hyde" nature insofar as Kentucky is concerned. Nearly 50,000 people in Kentucky are directly connected with the "whiskey business," and as a consequence depend on the business for a livelihood. The General Assembly knew this and realized that to prohibit all traffic in intoxicating liquors would visit

* Figures for 1938 showed 40.5%; 1937, 40.8%; 1936, 32.9%. Statistics on Distilled Spirits and Rectified Spirits and Wines, issued by the Alcohol Tax Unit, Bureau of Internal Revenue, U. S. Treasury Department.

† 192,352,572 gallons stored in internal revenue bonded warehouses June 30, 1938, ibid.

upon our State the worst ravages of depression. On the other side, it is well known that intoxicating liquors are the cause of much crime and delinquency. In addition to that, "hijackings" of trucks loaded with this commodity have been all too frequent in Kentucky. In some cases regular running gun battles have occurred. Then too, Kentucky has forty-eight (48) dry counties which have voted to prohibit the sale or use of such liquors within their bounds. The "business of bootlegging" with its evil consequences, must be guarded against. Kentucky has seen the terrors of uncontrolled intoxicating liquors, and it was to protect its people from these dangers that this comprehensive Act, designed to control all phases of the traffic, was passed. But of what use would be this protective Act if once these liquors were manufactured or released from storage, there was no control over the distribution thereof?

All through the day and night, trucks may be seen traveling the State's public roads. It would be an utter impossibility to police adequately all these highways to prevent transportation into these dry counties, or to prevent other illegal diversions. Without control of the distribution it would require the omnipresence of a deity to check the flow of liquor into unlicensed channels, thence to be surreptitiously peddled in back alleys to minors and habitual inebriates, to be sold on the Sabbath and after the hour of midnight, all in violation of the provisions of this law.

The lower court recognized the necessity of controlling the distribution of liquors:

> "It is an absurdity to say that Kentucky can control its liquor output but cannot control its distribution. The reason for one applies with triple force to the other. There are hundreds of independent trucks

operating in Kentucky under a contract carrier's license. They have no schedule, no fixed route, and no definite termini. It would be an impossibility to determine the quantity or destination, whether within or without the State of Kentucky, if distillers could call a passing truckman and make a private contract for hauling each load of liquor. Assuming that liquor, uncontrolled, is a dangerous element to the health, morals and welfare of the citizens of Kentucky, there appears no greater means by which Kentucky could mistreat her citizens than to permit the manufacture and sale of liquor, but have nothing to say about its handling while within the borders of the State."

Ziffrin, Inc. v. *Martin, et al.*, 24 Fed. Supp. 924, 932.

Nor is this the first time a court has recognized this fact:

"It is common knowledge that the successful administration of statutes prohibiting or regulating the traffic in intoxicating liquors depends on the ability of the state to enforce them; and the state's success in enforcing such laws is in direct proportion to its ability to control the transportation and delivery of the liquors. The state will have comparatively little trouble in enforcing its statutes prohibiting the manufacture, sale, and possession of illegal or bootleg liquors, if it can control their transportation and delivery; and the transportation and delivery by automobiles, motor trucks and motor vehicles constitutes the greatest difficulty."

Commonwealth v. *One Dodge Motor Truck*, 326 Pa. 120, 191 A. 590, 597.

Also: *Clark* v. *State*, — Tenn. —, 113 S. W. (2d) 374.

Indeed, it was recognized by this court that automobiles and trucks constitute the major difficulty, for in *United*

States v. *Simpson*, 252 U. S. 465, 64 L. Ed. 665, 666, this Court said in speaking of the Reed Amendment:

> "Had Congress intended to confine it to transportation by railroads and other common carriers, it may well be assumed that other words appropriate to the expression of that intention would have been used. And it also may be assumed that Congress foresaw that if the statute were thus confined, it could be so readily and extensively evaded by the use of automobiles, autotrucks and other private vehicles that it would not be of much practical benefit."

This Court has already recognized that intoxicating liquors have "well-known noxious qualities" and that their use brings about "extraordinary evils."

Crane v. *Campbell*, 245 U. S. 304, 307, 62 L. Ed. 304, 309.

There are no Federal laws covering this phase of the subject, and unless Kentucky provides for her own protection, she will be helpless before these evils flowing from this commodity.

Acts of 1938, Chapter 2, Section 93 (Section 2554b-194, Baldwin's 1938 Kentucky Statute Supplement), provides:

> "No distilled spirits or wine in excess of three gallons shall be stored or kept except upon the licensed premises of a person who is the holder of a license provided for in Section 18* or 29** of this Act. (*Sec. 2554b-114; **Sec. 2554b-126.)"

The Alcoholic Beverage Control Board has interpreted this section as allowing the receipt and the transportation of, without a license, amounts of these liquors up to three gallons by a person who has legally secured these liquors and who intends their legal use. (By legal use, we mean

a use in accordance with the provisions of this Alcoholic Beverage Control Law of 1938.)

Acts of 1938, Chapter 2, Section 89 (Section 2554b-190, Baldwin's 1938 Kentucky Statute Supplement), seeks to control the method of distribution by providing:

> "No person except a railroad company or railway express company shall transport or cause to be transported any distilled spirits or wine, otherwise than as provided in this Act, except such beverages as may be transported by the holder of any license authorized by section 18* of this Act, from and to express or freight depots to and from the premises covered by the license of the person so transporting distilled spirits or wine. (*Sec. 2554b-114.)"

The effect of these sections makes the receipt by a transporter of more than three gallons of such liquors illegal unless the receiver is a licensee or railway company or railway express company.

Acts of 1938, Chapter 2, Section 18(7) [Section 2554b-114(7), Baldwin's 1938 Kentucky Statute Supplement] provides for a:

> "License to transport distilled spirits and wine to or from any point in Kentucky, the fee for which shall be $10 per annum."

And in Acts of 1938, Chapter 2, Section 27 (Section 2554b-124, Baldwin's 1938 Kentucky Statute Supplement) is provided the business authorized under a transporter's license:

> "A Transporter's License shall authorize the holder to transport distilled spirits and wine to or from the licensed premises of any licensee under this Act, provided both the consignor and consignee in each case

are authorized by the law of the states of their residence, respectively, to sell, purchase, ship, or receive the alcoholic beverages, as the case may be."

Knowing that a license granted to all who applied for this license would serve as no protection against the traffic in illegal spirits, the Legislature wisely wrote in a standard with which all who wish to haul intoxicating liquors by truck over the highways to or from premises in Kentucky must comply. This standard is found in Acts of 1938, Chapter 2, Section 54(7) [Section 2554b-154(7), Baldwin's 1938 Kentucky Statute Supplement]:

> "A Transporter's License as provided for in section 18* (7) of this Act shall be issued only to persons who are authorized by proper certificate from the Division of Motor Transportation in the Department of Business Regulation to engage in the business of a common carrier. (* §2554b-114.)"

The purpose of requiring this standard is to reduce the job of patrolling the roads, and to provide a closer check on the transportation of these liquors. As common carriers run between definite termini, on a prescribed route, and on schedules (a contract carrier does none of these) the State would thus know the routes to patrol to prevent diversion and to protect against "hijacking."

The State, by a system of reports required of all licensees, can check rather accurately the purchases and sales of this commodity. Permits are required of distillers before making the whiskey, and these permits must state the number of gallons to be manufactured. The Federal storekeeper gauger's daily report (Form 1520), to which Kentucky officials have access, shows the actual "run." After the whiskey is placed in the warehouse, withdrawals

are entered on Federal Form 52A, and reported to Kentucky on State Form 501. When the whiskey is shipped from the warehouse, it is listed on Federal Form 52B and on State Form 501, and supplemented by unit report 503. The transporter must show where it was hauled, on State Form 503A, and receipt of the commodity by a Kentucky wholesaler will be shown on Federal Form 52A and State Form 502. But if the shipment were supposedly consigned to an out-of-state licensee, Kentucky could not always get an accurate check as to whether this whiskey in fact was received.

A common carrier has a fixed route; thus, if whiskey is reported shipped thereby, the possibilities of diversion are minimized. A diversion would require the collusion of these licensees under this system, all subject to penalties. (In addition to the system of reports, Kentucky makes audits of all licensees and checks the stock against the reports.) The Kentucky wholesaler must show his receipts of those liquors on Federal Form 52A and State Form 502, and the sales on Federal Form 52B and State Form 501, and supplemented by unit report 503. The transportation must again be shown on State Form 503A, and the State retailer receiving this merchandise must show his receipts on State Form 502. Again, if it were not for the control of the means of transportation, those liquors might be diverted into illegal fields. The retailer must keep an accurate list of his stock, so that his receipts may be checked against this stock. In this way, Kentucky protects against diversion.

The appellant, Ziffrin, Incorporated, is a contract carrier who has two contracts to transport intoxicating liquors manufactured in Kentucky from Louisville, Kentucky, to places situated north of the Ohio River. (R. 39, 43, 63.)

The appellant made application for a common carrier's certificate to the Kentucky Division of Motor Transportation of the Department of Business Regulations, *and was refused because appellant had not shown itself to be a common carrier. (R. 18.)* The appellant admits it made little or no effort to comply with this standard prescribed in the Act (R. 18), and so, of course, both the common carrier's certificate and the transporter's license were refused. There was no showing that a common carrier's certificate could not have been secured had appellant complied with the standards. Appellant took no appeal from this determination.

The law in question does not affect the status of appellant as a contract carrier in any manner save that if appellant wishes to receive intoxicating liquors for carriage, it must have the requisite common carrier's certificate. *This standard is the same to all; whether carriers are interstate or intrastate, there is no discrimination;* every person who secures a liquor transporter's license must hold a common carrier's certificate. *Every person not having this requisite will be refused.* The appellant is placed on a parity with every other person desiring to receive liquors for transportation. There has been no denial of equal protection; there is no arbitrary classification.

Nor can it be said that in any other way the appellant's business as a contract carrier is affected. Appellant may still come into Kentucky and go out unhampered carrying all freight save that Kentucky refuses to allow intoxicating liquors in the State to be received for transportation, loaded for transportation, or transported to or from premises therein by other than a licensee, railroad or railway express company.

Under this law of Kentucky, all such liquors over three gallons not in the possession of a licensee (Section 93,

Chapter 2, Acts of 1938; Section 2554b-194, Baldwin's 1938 Kentucky Statute Supplement) are illegal and contraband (Section 53, Chapter 2, Acts of 1938; Section 2554b-151, Baldwin's 1938 Kentucky Statute Supplement). Thus it is obvious that Kentucky has not seen fit to grant an absolute right in these liquors manufactured in Kentucky, but only a qualified right so long as they are to be kept within the prescribed channels.

Insofar as the record shows, the appellant only exports whiskies manufactured by two Kentucky distillers and so all questions concerning whiskies imported into the State are moot. *The sole question is whether Kentucky may regulate the receipt for distribution or the distribution (until the liquors cross the State's boundaries) of intoxicating liquors manufactured by Kentucky distillers by confining the distribution for hire to truck common carriers, railroads or railway express companies, when such liquors are considered so dangerous that no rights are allowed to be had therein unless they are to be kept in prescribed channels.*

ARGUMENT

The argument is summarized in outline form in the Subject Index, pages i-xiv.

I. THE ACT DOES NOT VIOLATE THE COMMERCE CLAUSE.

A. The Control of the Exportation of Intoxicating Liquors Manufactured in a State is a Local Matter Which May Best be Handled by That State.

It is a rather elementary principle of *commerce clause law* that there remains to the states the exercise of the power appropriate to their territorial jurisdiction in making suitable provisions for local needs. The state may provide local improvements, create and regulate local facili-

ties and adopt protective measures of a reasonable character in the interest of the health, safety, morals, and welfare of its people, although interstate commerce may be involved. See the *Minnesota Rate Cases*, 230 U. S. 352, 57 L. Ed. 1511; *Townsend* v. *Yeomans*, 301 U. S. 441, 81 L. Ed. 1210. State laws, not primarily aimed at commerce, but intended as legitimate exertions of this authority of the state to protect the public health, morals, and safety are not invalid because they may remotely or incidentally impose restrictions on interstate commerce, *Sherlock* v. *Alling*, 93 U. S. 99, 23 L. Ed. 819, or indeed are valid where "interstate commerce is materially affected." *South Carolina Highway Department* v. *Barnwell Bros.*, 303 U. S. 177, 82 L. Ed. 734; *Eichholz* v. *Public Service Comm.*, 306 U. S. 268, 83 L. Ed. (Adv. Opinions) 508.

> "Here the first inquiry has already been resolved by our decisions that a state may impose non-discriminatory restrictions with respect to the character of motor vehicles moving in interstate commerce as a safety measure and as a means of securing the economical use of its highways."
>
> *South Carolina Highway Department* v. *Barnwell Bros.*, 303 U. S. 177, 190, 82 L. Ed. 734, 742.

It is submitted that the restraint placed upon truck carriers by the Commonwealth of Kentucky is for the protection of local (State) welfare, safety, and morals and is not primarily aimed at interstate commerce. There is no discrimination against interstate traffic in intoxicating liquors, for all truck traffic carrying these liquors to or from premises in Kentucky, whether interstate or intrastate, is subject to these provisions. All those desiring to haul such liquors must comply with the requirements. The standard is the same for all.

It has been held that a state may regulate wharfage charges and exact tolls for the use of artificial facilities provided under its authority. The subject is one under state control where Congress has not acted, although the payment is requested of those engaged in interstate or foreign commerce. *Keokuk Packet Co.* v. *Keokuk*, 95 U. S. 80, 24 L. Ed. 377; *Cincinnati L. C. Packet Co.* v. *Catlettsburg*, 105 U. S. 559, 26 L. Ed. 1169; *Parkersburg & O. R. Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 27 L. Ed. 584. A state may adopt quarantine regulations or inspection laws. *Missouri, Kansas & Texas Ry. Co.* v. *Haber*, 169 U. S. 613, 42 L. Ed. 878; *Louisiana* v. *Texas*, 176 U. S. 1, 44 L. Ed. 347; *Rasmussen* v. *Idaho*, 181 U. S. 198, 45 L. Ed. 820; *Compagnie Francaise & Co.* v. *Board of Health*, 186 U. S. 380, 46 L. Ed. 1209.

State laws have been upheld which forbade persons in that State from receiving, selling, offering, or soliciting consignments of farm products for sale on commission in said State, unless a license was obtained. *Hartford Accident & Ind. Co.* v. *Illinois*, 298 U. S. 155, 80 L. Ed. 1099. A statute requiring the examining and licensing of all railroad engineers, was sustained (*Nashville, Chattanooga & St. Louis Railway Co.* v. *Alabama*, 128 U. S. 96, 32 L. Ed. 352), as was a statute forbidding the running of freight trains on Sunday (*Hennington* v. *Georgia*, 163 U. S. 299, 41 L. Ed. 166). Statutes regulating the heating of steam passenger cars have been upheld, although the cars were used in interstate traffic (*New York, New Haven & Hartford Railroad* v. *New York*, 165 U. S. 628, 41 L. Ed. 853), as have statutes requiring a "full crew" on trains running in the state. (*C., R. I. & P. Co.* v. *Arkansas*, 219 U. S. 453, 55 L. Ed. 290.) Statutes outlawing contracts exempting liability of a common carrier are valid. (*C., M. & St. P. Ry. Co.* v. *Solan*, 169 U. S. 133, 42 L. Ed. 688.)

Many of the above cases are cases involving railroads while the case at bar involves trucking a dangerous commodity over state highways, but trucking over the highways is even more subject to regulation according to *South Carolina State Highway Department* v. *Barnwell Bros.*, 303 U. S. 177, 82 L. Ed. 734.

Other cases may be found approving statutes which surely affect commerce as directly as the statute in question. For example, a statute prohibiting healthy people either from within or without the state, entering an area inflicted with a contagious disease (*Compagnie Francaise* v. *Board of Health*, 186 U. S. 380, 46 L. Ed. 1209); or a statute prohibiting the disenterment or exhuming of the body of a deceased person even when intended to be transported out of the state (*In re Wong Yung Quy*, 2 Fed. 624); or a prohibition of the slaughter of calves unless in healthy condition and at least four weeks old, and a prohibition of the shipment of veal from such animals (*People* v. *Bishop*, 89 N. Y. S. 709); or an ordinance prohibiting the trucking of certain quantities of gasoline over the city streets (*Ash* v. *Gibson*, 145 Kans. 825, 67 P. (2d) 1101). Indeed, a Washington statute regulating motor driven tugboats, including those used in interstate commerce was declared valid. (*Kelly* v. *Washington*, 302 U. S. 1, 82 L. Ed. 3, opinion by Mr. Chief Justice Hughes.) Maryland's law regulating the importation of anthracite coal by truck was held not such a burden on interstate commerce as to be invalid (*Yager* v. *State*, — Md. —, 200 Atl. 731), likewise Tennessee's law limiting the exportation of intoxicating liquors to shipment by common carriers or the manufacturer (*Clark* v. *State*, — Tenn. —, 113 S. W. (2d) 374). Nor was Pennsylvania's law which limited the transportation of such liquors to those licensed to transport them considered such a burden. (*Commonwealth* v. *One Dodge Motor Truck*, 326 Pa. 120, 191 Atl. 590.) A Florida law requiring the inspection of naval

stores before exportation was held valid. (*Jackson* v. *Cravens*, 235 Fed. 212.) Indiana's law limiting the transportation of dead animals to those licensed to carry them, and prohibiting all exportation was held valid by this Court (*Clason* v. *Indiana*, 306 U. S. 439, 83 L. Ed. (Adv. Op.) 599), as was Florida's statute which prohibited the shipment of unripe citrus fruits out of the State (*Sligh* v. *Kirkwood*, 237 U. S. 52, 59 L. Ed, 835).

B. Congress Has Not Occupied the Field.

If it be conceded that Congress may occupy the field of the transportation of intoxicating liquors over the highways, still until it be clearly shown that Congress has evidenced such an intent and has actually occupied the field, the State may regulate. (*Reid* v. *Colorado*, 187 U. S. 137, 47 L. Ed. 108; *M., K. & T. Ry. Co.* v. *Harris*, 234 U. S. 412, 58 L. Ed. 1377; *Kelly* v. *Washington*, 302 U. S. 1, 82 L. Ed. 3.)

Appellant contends that the Motor Carrier Act of 1935, Knox Act, Federal Alcoholic Administration Act, and Liquor Enforcement Act of 1936 cover the field. We will examine these Acts separately and show that they do not.

First, the Motor Carrier Act of 1935. This Act states the duties imposed on the Federal government, as regards contract carriers (of which appellant is one) to be:

> "(2) To regulate contract carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."
>
> (*49 U. S. C. A.*, Section 304; *49 Stat.* 546.)

In Section 302, we find the declaration of policy:

> "It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in such transportation and among such carriers in the public interest; promote adequate economical and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages and unfair or destructive competitive practices; improve the relations between and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several states and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this chapter."
>
> (*49 U. S. C. A.*, Section 302; *49 Stat.* 543.)

In no place in this Act is it indicated that Congress intended that this Act should cover the patrolling of the roads. Hence this is still a matter for the States to regulate for their protection and the States still have the power to make laws to simplify the patrolling of the roads.

In no place in this Act is it indicated that Congress intended that this Act should undertake to correct certain hazards created by the moving of certain commodities over the road: This Court has already said that where an article being moved across the State creates a hazard that the State may exercise its power to make special provisions for the inspection and policing thereof. *Morf v. Bingaman*, 298 U. S. 407, 80 L. Ed 1245. Surely the dangers incident to "hijacking" and "bootlegging" which we have already pointed out may be minimized by protective legislation.

In no place in this Act is it indicated that Congress intended that the Act prescribe for the hauling of inherently dangerous commodities which a State considers should not be freely transported. The case of *Clason* v. *Indiana*, 306 U. S. 439, 83 L. Ed. (Adv. Op.) 599, was decided subsequent to the passage of this Act, but no mention was made of this Act preempting the field.

Cannot a State also prescribe how other commodities considered by that State to be dangerous, should be hauled? If whiskey is hauled by anyone who wishes, will not some of this whiskey be sold to persons who are not authorized to handle this commodity and then in turn be peddled to minors and inebriates as well as sold in Kentucky's 48 dry counties? The same danger is not present in shipments by rail. Unless a State may control the movements of liquor over her roads, a breakdown of all regulation of this dangerous commodity must inevitably follow.

In no place in this Act is it indicated that Congress intended that this Act should cover the prescribing of the roads which a carrier may use.

In the case of *Bradley* v. *Public Utilities Commission of Ohio*, 289 U. S. 92, 77 L. Ed. 1053, 1056, an interstate carrier was refused the right to use a certain route and it was not apparent that there was any alternative route which might be used. The Court said:

> "The commerce clause is not violated by denial of the certificate to the appellant, if upon adequate evidence denial is deemed necessary to promote the public safety."

Appellant dwells long on the fact that the word "property" includes intoxicating liquors, and that as the Motor Carrier Act of 1935 deals with the transportation of property, hence Congress has preempted the field. To this

we submit that another Act of Congress giving railroads the authority to carry *freight and property* from one state to another did not authorize the shipment of diseased cattle into a state in derogation of that state's law. *M., K. & T. Ry. Co.* v. *Haber,* 169 U. S. 613, 42 L. Ed. 878. Likewise, it seems the transportation of a commodity considered dangerous is not covered in the Motor Carrier Act of 1935, and hence may not be done in derogation of the state's law. Secondly, intoxicating liquor is a commodity in which a person has only such property rights as the state sees fit to grant. (*Samuels* v. *McCurdy,* 267 U. S. 188, 69 L. Ed. 568.) As Kentucky has said that liquor may only be manufactured and trafficked in in Kentucky according to her laws, one of which is that it shall only be transported by a licensee under this Act in question, or a railroad or railway express company, there is no property right in such liquor transported in any other fashion and hence it is not property within the meaning of the Motor Carrier Act of 1935.

Second, The Knox Act.

The Knox Act (18 *U. S. C. A.,* Section 390) requires that "any package of or package containing any spirituous, vinous, malt or other fermented liquor, or any compound containing any spirituous, vinous, malt, or other fermented liquor fit for use for beverage purposes, 'to be shipped between states must be labeled on the outside cover' as to plainly show the name of the consignee, the nature of its contents and the quantity contained therein."

Appellees submit that this Act cannot be considered as showing that Congress intended to preempt the field regulating the transportation by motor truck of this noxious commodity. All this statute does is require that packages be labeled. In no way does it limit the transportation.

In *Sligh* v. *Kirkwood*, 237 U. S. 52, 59 L. Ed. 835, this Court found that the Federal Food and Drug Act relating to shipments in interstate commerce of fruit in filthy, decomposed, or putrid condition did not so preempt the field that a Florida statute making it a criminal offense to deliver for shipment, or to ship, in interstate commerce citrus fruits which were immature and unfit for consumption would be invalid.

Third, the Federal Alcoholic Administration Act (*27 U. S. C. A.*, Section 201, et seq.).

Clearly this Act has nothing whatever to do with the transportation of these noxious commodities. The only pertinent provisions deal with the requirement that the products must be bottled, packaged, and labeled in conformity with the rules and regulations prescribed by the Federal Alcoholic Administrator before being sold or delivered for shipment or shipped in interstate or foreign commerce.

Fourth, The Liquor Enforcement Act of 1936 (*27 U. S. C. A.*, Section 221, et seq.).

This Act deals solely with the importation into "dry" states. There is no shown intent to deal with the channelization of motor traffic in intoxicating liquors to prevent that which is supposedly on its way to an out-of-state dealer actually being diverted into illegal fields in the state of its manufacture.

Clearly then, we have a commodity recognized to have noxious qualities, whose use produces well known evils, a commodity recognized by its nature to be peculiarly subject to the police power. As was said by the lower court:

> "It is wholly within the territorial boundaries of the state, not yet placed in interstate commerce, and must be regulated by some authority. There is no federal

regulation. There is no Act of Congress prescribing the method or agency through which it may be transported over the highways or right-of-ways within the borders of the state. The lack of national legislative control is conspicuous."

Ziffrin, Inc. v. *Martin*, 24 Fed. Supp. 924, 931.

C. The State Having the Power to Prohibit the Manufacture or Sale or Transportation for Exportation of Certain Commodities Manufactured, Grown, or Developed Therein when Such Commodities are Considered by the State to be Dangerous to Health, Morals, or Safety, Surely has the Lesser Authority to Regulate.

It is the contention of the Commonwealth of Kentucky that as a sovereign state, it may prohibit the manufacture or sale (*Kidd* v. *Pearson*, 128 U. S. 1, 32 L. Ed. 346) or transportation for exportation (*Clason* v. *Indiana*, 306 U. S. 439, 83 L. Ed. (Adv. Op.) 599) of certain commodities manufactured, grown, or developed therein when such commodities are considered by the state to be inherently dangerous to health, morals or safety, if uncontrolled.

Having the authority to prohibit, the State certainly has the lesser authority to regulate (*Seaboard Air Line* v. *North Carolina*, 245 U. S. 298, 62 L. Ed. 299; *State Board of Equalization* v. *Young's Market*, 299 U. S. 59, 81 L. Ed. 38; *Eberle* v. *Michigan*, 232 U. S. 700, 58 L. Ed. 803) ~~Hack~~ Products dangerous to health, morals, or safety, if uncontrolled.

In the case of *Kidd* v. *Pearson*, 128 U. S. 1, 32 L. Ed. 346, an Iowa statute which limited the manufacture or sale of intoxicating liquors to the manufacture or sale within the state for mechanical, medicinal, culinary, and sacramental purposes, but for no other use—not even for the purpose of transportation beyond the limits of the state—was

under consideration. In the opinion Mr. Justice Lamar stated:

> "We have seen that whether a State, in the exercise of its undisputed power of local administration, can enact a statute prohibiting within its limits the manufacturing of intoxicating liquors, except for certain purposes, is not any longer an open question before this court. Is that right to be overthrown by the fact that the manufacturer intends to export the liquors when made? Does this statute in omitting to except from its operation the manufacture of intoxicating liquors within the limits of the State for export, constitute an unauthorized interference with the power given to Congress to regulate commerce?
>
> "These questions are well answered in the language of the court in the *License Tax Cases*, 72 U. S. 5 Wall. 470 (18:500) 'Over this commerce and trade (the internal commerce and domestic trade of the States), Congress has no power of regulation, nor any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject'. The manufacture of intoxicating liquors in a State is none the less a business within that State because the manufacturer intends at his convenience, to export such liquors to foreign countries or to other States."
>
> 128 U. S. 1, 23, 32 L. Ed. 346, 351.

Clearly then, this case established the doctrine that a State may limit intoxicating liquors manufactured therein so that none may be exported therefrom.

Upon examination of the case of *Kidd* v. *Pearson*, supra, it will be found that the same argument advanced

by appellant in the present controversy was considered and expressly disapproved. The plaintiff in error, J. S. Kidd, argued that intoxicating liquors were property, that traffic in them was within the term "commerce" of the Constitution, and that exports and imports stood upon precisely the same footing (prior to the Wilson, Webb-Kenyon, or Reed Acts, or the Twenty-first Amendment).

> "To support the affirmative, the plaintiff in error maintains that alcohol is, in itself, a useful commodity, not necessarily noxious, and is a subject of property; that the very statute under consideration, by various provisions, and especially by those which permit, in express terms, the manufacture of intoxicating liquors for mechanical, medicinal, culinary or sacramental purposes, recognizes those qualities and expressly authorizes the manufacture; that the manufacture being thus legalized, alcohol not being per se a nuisance, but recognized as property and the subject of lawful commerce, the State had no power to prohibit the manufacture of it for foreign sales.
>
> "The main vice in this argument consists in the unqualified assumption that the statute legalizes the manufacture. The proposition that, supposing the goods were once lawfully called into existence, it would then be beyond the power of the State either to forbid or impede their exportation, may be conceded. Here, however, the very question underlying the case is whether the goods ever came lawfully into existence. It is a grave error to say that the statute 'expressly authorized' the manufacture for it did not: . . ."
>
> 128 U. S. 1, 18, 32 L. Ed. 346, 349.

It is likewise true that the Kentucky Statute did not give an unqualified right to manufacture intoxicating liquors but only a right to manufacture and traffic therein in accordance with the law in question.

The licenses issued to all distillers contained the following provision:

> "The above named licensee is hereby authorized, pursuant to the Alcoholic Beverage Control Law of 1938, to engage in the business of a vintner, distiller, rectifier or blender, as provided by this license and as defined in the Alcoholic Beverage Control Law of 1938, during the period of this license and subject to the laws, rules and regulations of the Commonwealth of Kentucky and local governmental units relating to alcoholic beverages."
>
> (A similar provision was placed in every other type of license.)

Each distiller was only given a qualified right to manufacture alcoholic beverages. The right to manufacture was subject to the laws of the Commonwealth of Kentucky. One of the laws of the Commonwealth of Kentucky states how their manufactured product may be distributed. Thus if they manufacture intoxicating liquors and attempt to distribute them by another method, the distiller is subject to having his license revoked.

A similar provision may be found in each license issued during 1938-1939 and during the present license year 1939-1940.

In 1896, eight years after this Court decided *Kidd* v. *Pearson*, another case presented an opportunity for the court to extend the principle that the right to prohibit the manufacture of the product necessarily carries with it the right to prevent its export. This case was *Geer* v. *Connecticut*, 161 U. S. 519, 40 L. Ed. 793, wherein was involved a Connecticut Statute which provided that no person should kill certain named wild game *for the purpose of conveying same beyond the limits of the State or should transport or have in possession with intention to procure the transporta-*

tion beyond said limits. Mr. Justice White in writing the opinion which held the statute constitutional under the Commerce Clause said:

> "The fact that internal commerce may be distinct from interstate commerce destroys the whole theory upon which the argument of the plaintiff in error proceeds. *The power of the state to control the killing of and ownership in game being admitted, the commerce in game which the state law permitted was necessarily only internal commerce since the restriction that it should not become the subject of external commerce went along with the grant and was a part of it.* All ownership in game killed within the state came under this condition which the state had the lawful authority to impose, and no contracts made in relation to such property were exempt from the law of the state consenting that such contracts be made provided only they were confined to internal and did not extend to external commerce.
>
> *"The case in this respect is identical with Kidd* v. *Pearson, 128 U. S. 1."*
>
> (Emphasis ours.)
>
> 161 U. S. 519, 532, 40 L. Ed. 793, 798.

And in *Geer* v. *Connecticut*, supra, we also find the Court expressly disapproving an argument similar to that presented by the appellant in this case.

> "So here the argument of the plaintiff in error substantially asserts that the state statute gives an unqualified right to kill game, when in fact it is only given upon the condition that the game killed be not transported beyond the state limits. It was upon this power of the state to qualify and restrict the ownership in game killed within its limits that the court below rested its conclusion and similar views have been expressed by the courts of last resort of several of the states."
>
> 161 U. S. 519, 532, 40 L. Ed. 793, 798.

Likewise as we have already pointed out, Kentucky did not give an unqualified right to manufacture or sell intoxicating liquors. All that was given to the manufacturer was a qualified privilege and one of the qualifications was that they would carry on their business in accordance with the laws of Kentucky, one of which laws channelizes the transportation of alcoholic liquors to prevent their diversion to illicit fields. Thus this Act also affects the product before it begins to move in commerce of any kind.

Then twenty years after writing the *Kidd* v. *Pearson* opinion and eight years after deciding *Geer* v. *Connecticut* this court again had occasion, in another case, to follow this same doctrine. That case, *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 52 L. Ed. 828, arose from the questioning of the constitutionality of a New Jersey statute which prohibited a riparian owner from diverting the water of a New Jersey stream into any other state. Mr. Justice Holmes, in writing the opinion which held the statute valid, based his opinion upon *Geer* v. *Connecticut*, supra, a case which was held "identical" with *Kidd* v. *Pearson*, supra. In the opinion the following assertion may be found:

> "A man cannot acquire a right to property by his desire to use it in commerce among the states. *Neither can he enlarge his otherwise limited and qualified right to the same end. The case is covered in this respect by Geer* v. *Connecticut.*"
>
> (Emphasis ours.)
>
> 209 U. S. 349, 357, 52 L. Ed. 828, 832.

If Mr. Justice Holmes based his opinion on *Geer* v. *Connecticut*, supra, which in turn was based on *Kidd* v. *Pearson*, supra, a case which prohibited the exportation from a state of intoxicating liquors manufactured therein, the rule laid down in *Hudson County Water Co.* v.

McCarter must be applicable as well to a case in which intoxicating liquors manufactured in a state are being controlled prior to their crossing the border of that state in which they were manufactured.

Again in 1915, we find this court deciding a case which stemmed from the seeds of *Kidd* v. *Pearson*, supra. In that case, *Sligh* v. *Kirkwood*, 237 U. S. 52, 59 L. Ed. 835, can be found an extension of the *Kidd* v. *Pearson* doctrine. A Florida statute which prohibited the sale, shipping, or delivering for shipment of any citrus fruits which were unripe or otherwise unfit for consumption was attacked as unconstitutional under the Commerce Clause. Mr. Justice Day in writing the opinion and citing *Geer* v. *Connecticut*, supra, as authority, held that that statute was not a regulation of interstate commerce.

Sligh v. *Kirkwood*, supra, extends the doctrine of *Kidd* v. *Pearson*, in two directions. *First*, it will be noted that there was not a prohibition of the shipping of all citrus fruits grown in the state, but instead a prohibition of the shipping of part of the crop.

Second, and more important, it will be noted that *the prohibition was not as to the growing of the fruit or the picking of the fruit which may be likened to the manufacturing of intoxicating liquors; indeed, what the court approved went one step further, the prohibition of the shipping of these fruits after they were grown and picked.*

Working on the already mentioned premise that this case was based on *Geer* v. *Connecticut*, supra, a case held "identical" with *Kidd* v. *Pearson*, which dealt with the prohibition of the manufacture of intoxicating liquors for export, *it follows that Kentucky could have prohibited not only the manufacture of intoxicating liquors but could have prohibited the shipping of alcoholic liquors manufactured in the state.*

One statement from the case deserves particular mention at this point:

> "Nor does it make any difference that such regulations incidentally affect interstate commerce when the object of the regulation is not to that end, but is a legitimate attempt to protect the people of the state."
>
> 237 U. S. 52, 60, 59 L. Ed. 835, 838.

What could be more protection to Kentucky than a comprehensive law designed to channelize the traffic in intoxicating liquors to prevent these liquors from destroying the morals of our youth, the ties of our family, and the health and safety of our people?

Counsel for appellant attempt to distinguish this case by saying that it involved unsound and unwholesome foodstuffs and hence it was competent to regulate the commerce in such noxious substances. This court has often recognized that intoxicating liquors destroy the morals of a people. *Can it be that health may be protected when morals may not?*

Less than a year ago, this Court added the latest descendant of the *Kidd* v. *Pearson* doctrine. In the case of *Clason* v. *Indiana*, 306 U. S. 439, 83 L. Ed. (Adv. Op.) 599, an Indiana statute which prohibited the *transportation without a license* of dead animals not slaughtered for food was questioned as being in conflict with the Commerce Clause.

This court held that a state might allow the transportation within the state of dead animals not killed for food purposes but prohibit the exportation thereof. Mr. Justice McReynolds in writing the opinion cited as authority that such an act was constitutional, the case of *Sligh* v. *Kirkwood*, supra. We have already shown that *Sligh* v. *Kirk-*

wood was based on *Geer* v. *Connecticut*, supra, which in turn was based on *Kidd* v. *Pearson*, supra, a case which involved the prohibition of the manufacture of intoxicating liquors for exportation.

Obviously, if this case is based on a case, which in turn was based on a case involving the prohibition of the manufacture for exportation of intoxicating liquors, this case's holding will also apply to intoxicating liquors.

A quotation from Mr. Justice McReynolds' opinion will also show that the same argument advanced by counsel for appellant in the present controversy was considered and disapproved.

> "Here, contrary to what seems to be the insistence of counsel, the State has not recognized dead horses as legitimate articles of intrastate commerce. It permits them to be sold only to licensed operators who must transport them immediately under strict sanitary regulations for prompt delivery to a licensed plant, there to be rendered innocuous without delay by prescribed methods. All this is part of a workable scheme to secure prompt removal of decaying carcasses and thus protect against obvious evils."

In the present case, contrary to the contentions of counsel for appellant, intoxicating liquors manufactured in this state are not allowed to be unqualifiedly trafficked in. Indeed, no one may manufacture, wholesale, transport, or receive for transportation, or retail such liquors unless they have shown that they have the requirements prescribed in the Alcoholic Beverage Control Law of 1938 (Sections 2554b-98 to 2554b-222, Baldwin's 1938 Kentucky Statute Supplement), and have secured a license thereunder. No such liquor may be sold to minors or habitual inebriates, nor may sales be made on Sundays or after midnight or at

all in any of Kentucky's 48 dry counties. Thus the obvious purpose of this comprehensive law is to protect Kentuckians "against obvious evils" which may arise from an uncontrolled flood of liquors.

Before a manufacturer may manufacture intoxicating liquors in Kentucky, he must be licensed. A licensed manufacturer may only sell to a licensed wholesaler, or other licensed person authorized by the State of his residence to operate. Likewise a licensed wholesaler may only sell to a licensed retailer or other licensed person authorized by the State of his residence. A licensed retailer can only sell to certain persons, and may not sell to minors, habitual inebriates, or persons whose families are poverty stricken. Also, the amount of liquor any one person may have is strictly limited.

In order to insure this system of allowing bonded licensees to handle these liquors, the Kentucky General Assembly also provided for a license to transport, the effect of which also regulated the receipt for transportation. This was all one "comprehensive scheme . . . to protect against obvious evils." (*Crane* v. *Campbell*, supra.)

Appellant's counsel attempt to distinguish *Sligh* v. *Kirkwood*, supra; and *Clason* v. *Indiana*, supra, from the case at bar by saying that in those cases were involved products deleterious to health. Our answer to this is twofold: *First*, we ask this court to consider whether intoxicating liquors are anything other than deleterious to health. *Second*, intoxicating liquors are known to undermine the morals of the community, and unripe grapefruit and dead horses are not known to have such an effect. Can it be that a state may protect itself against a deleterious food stuff, but not against a contributor to the delinquency of its youth? Of course this Court cannot put the protection of health on a different plane from the protection of

morals. Yet to distinguish these cases from the controversy at bar would be to do that very thing.

As we have pointed out, this Court has already recognized that intoxicating liquors have well known noxious qualities and that their use brings about "extraordinary evils." (Mr. Justice McReynolds, in *Crane* v. *Campbell*, 245 U. S. 304, 62 L. Ed. 304.)

This Court has never confined the doctrine of *Sligh* v. *Kirkwood* to unhealthy commodities, and it is worth noting that Justices Holmes and Brandeis did not consider this doctrine of that case to be confined solely to commodities deleterious to health. See dissenting opinion in *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 67 L. Ed. 1117.

So we find that this Court has, in at least five cases beginning with *Kidd* v. *Pearson*, supra; and continuing with *Geer* v. *Connecticut*, supra; *Hudson County Water Co.* v. *McCarter*, supra; *Sligh* v. *Kirkwood*, supra; and *Clason* v. *Indiana*, supra, adhered to the doctrine that *a state may prohibit the exportation of a commodity which the State has allowed to be trafficked in for domestic purposes.*

All these cases are kin. Each of the later cases, as we have shown, relies on *Kidd* v. *Pearson*, 128 U. S. 1, 32 L. Ed. 346, as its ultimate authority. In each of the cases, it was determined that as the state had the power of prohibiting the "making" or "taking" of the commodity, the state thus had the right of forbidding the exportation of the commodity.

In two of these cases, the Court went one step further and approved statutes which prohibited the transportation of certain commodities after they were "taken."

In one of these cases, instead of prohibiting all transporation of a commodity, it was prohibited to all save those licensed therefor—and this Court held the statute valid.

Likewise in Kentucky the transportation over the road of intoxicating liquors to or from Kentucky premises is prohibited to all save those who are licensed to transport them.

This Court having recognized the power of the State to prohibit the exportation of that which the State has the absolute right to forbid the traffic in, it necessarily follows that the power to prohibit all transportation or exportation includes the lesser power of channelizing the traffic for the protection of the state. At least three State Supreme Courts have approved this doctrine. *Commonwealth* v. *One Dodge Motor Truck*, 326 Pa. 120, 191 Atl. 390; *Jefferson County Distilling Co.* v. *Clifton*, 249 Ky. 815, 61 S. W. (2d) 645, 88 A. L. R. 1361; *Clark* v. *State*, — Tenn. —, 113 S. W. (2d) 374.

Moreover this Court in the case of *Seaboard Air Line* v. *North Carolina*, 245 U. S. 298, 62 L. Ed. 299, approved a similar doctrine for the importation of intoxicating liquors. The opinion writer, Mr. Justice McReynolds, stated:

> "The challenged act instead of interposing an absolute bar against all shipments, as it was within the power of the State to do, in effect permitted them upon conditions intended to secure publicity, to the end that public policy might not be set at nought by subterfuge and indirection. *The greater power includes the less.*" (Emphasis ours.)
>
> 245 U. S. 298, 304, 62 L. Ed. 299, 304.

To like effect Mr. Justice Brandeis wrote in *State Board of Equalization* v. *Young's Market*, 299 U. S. 59, 63, 81 L. Ed. 38, 41:

> "Surely the State may adopt a lesser degree of regulation than total prohibition."

As said by Mr. Justice Holmes, in *Rippey* v. *Texas*, 193 U. S. 504, 509, 48 L. Ed. 767, 769:

> "But the State has power to prohibit the sale of intoxicating liquors altogether if it sees fit, *Mugler* v. *Kansas*, 123 U. S. 623, and that being so, it has power to prohibit it conditionally."

This Court has often stated that:

> "The right to absolutely exclude all right to use, necessarily includes the authority, to determine under what circumstances such use may be availed of, as the greater power contains the lesser."
>
> *Davis* v. *Mass.*, 167 U. S. 43, 48; 42 L. Ed. 71, 72, and see: *Title Co.* v. *Wilcox Bldg. Corp.*, 302 U. S. 120, 82 L. Ed. 147; *Packard* v. *Banton*, 264 U. S. 140, 68 L. Ed. 596; *Eberle* v. *Michigan*, 232 U. S. 700, 58 L. Ed. 803.

So if the state has the power to prohibit all manufacturing for exportation, *Kidd* v. *Pearson*, supra, or all transportation for exportation, *Clason* v. *Indiana*, supra, the state may adopt a lesser degree than total prohibition. "The greater power includes the less." *Seaboard Air Line* v. *North Carolina*, supra.

Instead of prohibiting all manufacture of these liquors in Kentucky (*Mugler* v. *Kansas*, 123 U. S. 623, 31 L. Ed. 205) all sales (*Rippey* v. *Texas*, supra) and all transportation for exportation (*Sligh* v. *Kirkwood*, supra; *Clason* v. *Indiana*, supra) the state surely could relax this prohibition

to allow the manufacturing, selling, or transportation for exportation which complies with the standards set forth in the law.

In Kentucky intoxicating liquors do not become a legitimate subject of sale or commerce by the licensee unless shipped or transported by a person so authorized by the State. Witness what the Kentucky Court of Appeals has said:

> "It is argued however, that to prohibit the transportation for sale for beverage purposes, where such sales are lawful, whisky now stored, or which may be hereafter stored in Kentucky, regardless of whether such whisky was manufactured for other than beverage use, would be to interfere with interstate commerce, and that hence the lower court erred in answering the second question in the negative. The case of *State* v. *Peet*, 80 Vt. 449, 68 A. 661, 14 L. R. A. (N. S.) 677, 130 Am. St. Rep. 998, is relied upon. The argument overlooks the fundamental proposition that the whisky stored and to be stored and on which transportation is sought was and is to be manufactured for one or more of certain specific purposes, to wit, sacramental, medicinal, scientific, or mechanical. The state could have forbidden the manufacture of the whisky for any purpose, though to be used outside of the state, and such prohibition would not have violated any constitutional provisions as to regulation of interstate commerce. *Kidd* v. *Pearson*, 128 U. S. 1, 9 S. Ct. 6, 32 L. Ed. 346. This being true, it could relax the prohibition as to certain excepted uses, retaining in full vigor the prohibition as to other cases. Having manufactured for the excepted uses, the appellant may not divert the article so manufactured to other uses and then invoke the commerce clause of the Federal Constitution to shield it in its transportation of that liquor for such other uses. The appellant secures the right to manufacture because of the use to which it proposes to devote the liquor. To hold it to its proposal after

the liquor is manufactured violates no part of the commerce clause of the Federal Constitution."

Jefferson County Distilling Co. v. *Clifton*, 249 Ky. 815, 61 S. W. (2d) 645, 647.

Thus it is clear that the Kentucky Court of Appeals felt that a distiller might only manufacture whiskey because given permission by the State; likewise a person may only lawfully ship the commodity when given permission by the State and only under the conditions laid down by the State. By accepting a license under the Alcoholic Beverage Control Law of 1938, the distillers and other licensees have agreed to ship only by those authorized to have this commodity:

"Under our statutes, liquor manufactured in this State does not become the subject of legal commerce or transportation for delivery either without or within the State—either interstate commerce or intrastate commerce—unless or until it is loaded for delivery on a vehicle authorized by law, to transport and deliver it."

Commonwealth v. *One Dodge Motor Truck*, 326 Pa. 120, 191 A. 590, 598, 110 A. L. R. 919.

The same statement is applicable to the Kentucky situation.

We also wish to call attention to the following paragraph from *Clark* v. *State*, — Tenn. —, 113 S. W. (2d) 374, 381:

"It is suggested that the transportation of liquors, by the manufacturer or common carrier, from a county voting for manufacture, across counties not voting for manufacture, as allowed by the act, makes that not a crime by the manufacturer or common carrier which is a crime for all others. The Legislature could have, of course, repealed all laws with reference to the pro-

hibition of the transportation of liquor. Having that right, the power to prohibit it conditionally must exist. The regulation that the transportation must be by the manufacturer or common carrier is an incident to the right of manufacture under the act. The manufacture being allowable only for sale without the State, provision for the transportation of the liquor was a necessity. Such transportation would be interstate commerce. Such regulation is reasonable in that the act confines transportation from the place of manufacture to points outside the State to recognized and responsible agencies, and prevents the transportation of liquor by all others, which the Legislature evidently regarded as a possible course of infraction of the liquor laws. No person has the inherent right to transport intoxicating liquor and the limiting of this right, under the conditions set out in the act to the manufacturer or common carrier, cannot be said to be an arbitrary classification. Code § 6619, for instance, prohibits the possession of opium, etc., but by paragraph "h," the prohibition does not apply to common carriers."

Can it be doubted that the State might have established a state monopoly of the manufacture and sale of intoxicating liquors and thus have limited the exportation solely to this monopoly? See *State Board of Equalization* v. *Young's Market*, 299 U. S. 59, 81 L. Ed. 38. Likewise does it not follow that the state might have established a monopoly on just the sales, wholesale and retail, allowing such liquors to be manufactured within the state, provided all the products be marketed through this monopoly? Look to this statement by Mr. Justice Brandeis in *State Board of Equalization* v. *Young's Market*, supra:

"Surely the state may adopt a lesser degree of regulation than total prohibition. Can it be doubted that a State might establish a state monopoly of the

manufacture and sale of beer and either prohibit all competing importations, or discourage importation by laying a heavy impost, or channelize desired importations by confining them to a single consignee? Compare *Slaughter House Cases*, 16 Wall. 36; *Vance* v. *W. A. Vandercook Co.* (No. 1) 170 U. S. 438, 447. There is no basis for holding that it may prohibit or so limit importation only if it establishes monopoly of the liquor trade."

299 U. S. 59, 63, 81 L. Ed. 38, 41.

As the Constitution expressly prohibits taxes or duties on exports, a state could not place an impost on exports but except for this one distinction, the above statement of Mr. Justice Brandeis might be made applicable to the present controversy by substituting the word "exportation" for "importation" and "consignor" for "consignee."

This Court has for 50 years held that a state might in effect prohibit all exportation of intoxicating liquors. (*Kidd* v. *Pearson*, supra.) The Webb-Kenyon Act was required to give to a state the power to prohibit their importation, but now both the importation and exportation of such liquors are subject to total prohibition. Hence the reasoning of Mr. Justice Brandeis should apply with equal force to exports. And if the same reasoning apply, then "*there is no basis for holding that it may prohibit or so limit the exportation only if it establishes a monopoly of the liquor trade.*"

D. The Statute in Question Making the Receipt by an Unauthorized Carrier Illegal Thus Affects the Product before It Begins to Move in Commerce of Any Kind.

It is the further contention of the appellees that these statutes (Section 93,* Chapter 2, Acts of 1938 and Section 89† thereof) affect intoxicating liquors manufactured in this

* Quoted on page 7.
† Quoted on page 8.

state before they have begun to move in commerce of any kind because in reading these two sections together it is apparent that the receipt as well as the transportation itself, by an unlicensed trucker of more than three gallons of such liquors is illegal.

The lower court determined that:

> "It is wholly within the territorial boundaries of the state, not yet placed in interstate commerce and must be regulated by some authority."

The language of the Pennsylvania Supreme Court may be quoted at this point:

> "Under our statutes liquor manufactured in this state does not become the subject of legal commerce or transportation for delivery within or without the state —either interstate commerce or intrastate commerce— unless or until it is loaded for delivery on a vehicle authorized by law to transport and deliver it."
>
> *Commonwealth v. One Dodge Motor Truck*, 326 Pa. 120, 191A, 590, 598.

It has already been determined by this Court that interstate commerce begins when a legitimate article of interstate commerce is "delivered to a carrier for transportation." *Texas Etc. R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111, 57 L. Ed. 442; *Coe* v. *Errol*, 116 U. S. 517, 29 L. Ed. 715; *McCluskey* v. *Marysville & N. R. Co.*, 243 U. S. 36, 61 L. Ed. 578. (Indeed appellant admits this fact in his brief, page 99.) As a legal receipt is necessary to a valid delivery, it follows that in making the receipt by an unlicensed trucker of more than three gallons unlawful, this statute takes effect before the movement in interstate commerce in the same manner as did the statutes involved in *Kidd* v. *Pearson*, supra, and *Sligh* v. *Kirkwood* (discussed supra),

where the Court upheld a statute making it a criminal offense to *deliver for shipment* in interstate commerce citrus fruits immature and unfit for consumption.

This Court in those cases has already determined that when a state declares certain articles harmful and prohibits their "delivery to a carrier" such a statute is valid. The same point is now before this court for as we have pointed out, Kentucky has declared that receipt by a trucker not authorized to transport more than three gallons of these liquors is illegal. *Clason* v. *Indiana*, supra, is more exactly in point because receipt by other than an authorized transporter was there prohibited but a licensee was allowed to haul the commodity.

Appellant attempts to combat this argument by quoting the case of *Lemke* v. *Farmers' Grain Co.*, 258 U. S. 50, 58, 66 L. Ed. 458, 464, insofar as it says:

> "Nor will it do to say that the State law acts before the interstate transaction begins. It seizes upon the grain and controls its purchase at the beginning of interstate commerce."

We wish to point out to the Court three vital distinctions between this case and the controversy at bar. First, the product in question there was harmless wheat as compared in this controversy with a subject which this Court has determined as "noxious" and as producing "evil consequences." Second, we wish to quote further from this case wherein Mr. Justice Day stated:

> "Nor is this conclusion opposed by cases decided in this court and relied upon by appellants, in which we have had occasion to define a line between State and Federal authority under facts presented, and require a

definition of interstate commerce where the right of State taxation was involved, or manufacture . . ."

258 U. S. 50, 55, 66 L. Ed. 458, 462.

Both of these distinguishing points are involved in the present controversy because the intoxicating liquors in question are manufactured in Kentucky in like manner as the whiskey involved in the case of *Kidd v. Pearson* was manufactured in Iowa, and also like Iowa, Kentucky has not given an unqualified right to traffic therein. On the other hand, harmless wheat is a product which has no known "noxious qualities," produces no "evil consequences," and there is no reason why a state should not give the unqualified right to traffic therein.

As to taxation, Kentucky places a production tax on the manufacture of all intoxicating liquors in this State, and also places a retail sales tax on the retail sale of all such commodities in this State. Hence, Kentucky is, from a revenue point of view, also interested in protecting against untaxed manufacture and sales. Thus, it will be seen that both distinctions pointed out in *Lemke v. Farmers' Grain Co.*, supra, are present in this controversy.

Finally, we wish to point out that even appellants' counsel do not really consider the *Lemke* case to be controlling in this controversy, for on page 99 of their brief they state:

> "Yet, it is precisely at the moment of delivery of the consignment to the carrier that the commerce acquires its interstate character and the protection of the Commerce Clause."

Obviously, if Kentucky has the right to control the manufacture it has the right also to state who may receive

this whiskey for transportation, and such a provision would affect the product prior to its introduction in interstate commerce. See dissenting opinions of Mr. Justice Holmes and Mr. Justice Brandeis in *Penn. v. W. Va.*, 262 U. S. 553, 67 L. Ed. 1117.

E. A State May Control the Use of Its Roads to Simplify Policing and to Reduce Hazards.

As we have said the Alcoholic Beverage Control Law of 1938 is a comprehensive act designed to control the traffic in and manufacture of alcoholic beverages. The title to the Act provides in part:

> "An Act providing for the regulation of the manufacture of and traffic in alcoholic beverages; . . ."

Appellant in this controversy contends that because of Section 51 of the Kentucky Constitution, nothing in the Control Law's provisions warrants interpreting that Act to be a measure designed to regulate the use of the highways. It will be noted that Section 51 of the Kentucky Constitution provides:

> "No law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title, and no law shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended or conferred, shall be re-enacted and published at length."

We submit that the law in question relates to but one general subject, *the control of alcoholic beverages from their manufacture or importation to their use or exportation.*

As has been said by the Kentucky Court of Appeals:

> "It is never required that the title state the general manner in which the object of an act is to be accomplished."
>
> *Estes* v. *State Highway Commission*, 235 Ky. 86, 29 S. W. (2d) 583, 586; *Collins* v. *Henderson*, 74 Ky. (11 Bush) 74; *Commonwealth* v. *Bailey*, 81 Ky., 395, 4 Ky. L. Rep. 85.

Granted that this law is not designed as a measure to control generally the use of the roads, but it certainly is a measure designed to control the *traffic* in alcoholic beverages over the roads. The title to the act stated this purpose and the word "traffic" includes transportation. (Webster's New International Dictionary.)

Insofar as the appellant is concerned, the statute in question only affects the using of the roads and streets for the transportation of intoxicating liquors. It is to be remembered that the appellant is using the roads and streets of the Commonwealth of Kentucky and its subdivisions for the carrying on of a private business. As has been said, the State has the power to condition the use thereof as a place for the carrying on of a private business (*Hodge Co.* v. *Cincinnati*, 284 U. S. 335, 76 L. Ed. 323; *Stephenson* v. *Binford*, 287 U. S. 251, 77 L. Ed. 288).

> "From the beginning, it has been recognized that a state can if it sees fit, build and maintain its own highways, canals and railroads, and that in the absence of Congressional action their regulation is peculiarly within its competence, even though interstate commerce is materially affected.
>
> "Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. There are few local regulations of which are so inseparable

from a substantial effect on interstate commerce. Unlike the railroads, local highways are built, owned and maintained by the State or its municipal subdivisions."

South Carolina State Highway Department v. *Barnwell Bros.*, 303 U. S. 177, 187, 82 L. Ed. 734, 740.

(And it should be noted that the roads in that case were built with Federal aid in the same manner as were some Kentucky roads. More than this, the appellant in this controversy runs over streets of the city of Louisville which were not built with Federal aid.)

It is a well-known fact that whiskey is a product highly attractive to "hijackers." The value of a truckload of whiskey may easily run over $10,000 and seizure of trucks and cargoes have been rather frequent during the years following repeal of the Eighteenth Amendment. In some cases running gun battles have been staged on our roads, creating a danger to others who might happen to be in the vicinity.

Another reason for patrolling the highways is the 48 dry counties in Kentucky. Unless the traffic in alcoholic beverages over our highways is carefully supervised, the desires of these local subdivisions will be violated by bootleggers, who under cover of night will haul truckloads of whiskey for disposition in those counties. If the state knows who may legally haul such liquors and over what roads they will operate, the policing job is simplified.

It is a well-known fact that the bootlegger carries on his acts under cover of darkness, furtively speeding over the roads with lights dimmed, driving at a reckless rate. This situation is a danger to the state, making the roads more hazardous.

It is in this manner that intoxicating liquors have increased the job of policing the highways of the State to prevent lawlessness. The cost of adequately policing all highways against such actions would be prohibitive. Cargoes of whiskey create a special hazard on the roads. Surely this is a situation which the States may cope with by requiring that the State know what roads will be used for the transportation of intoxicating liquors, so that said roads may be more carefully patrolled. As a common carrier may only haul between specified points on a prescribed route, the State will know this route and be able to better protect against the mentioned dangers, thus reducing the patrolling problem. As was said by Mr. Justice Stone in *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 83 L. Ed. (Adv. Op.) 736, the states may classify the vehicles according to the traffic and the burden it imposes on the state by that use. This Court has already recognized the fact that when certain traffic creates special hazards and calls for extra policing, this traffic may be separately classified.

> ". . . and for that purpose they may classify the vehicles according to the character of traffic and burden it imposes on the State by that use. . . ."
>
> *Clark* v. *Paul Gray, Inc.*, supra.

F. Cases Relied upon by Appellant Are to be Distinguished from the Case at Bar.

Relative to the constitutionality of this act under the Commerce Clause, the appellant cites many cases which we believe have no bearing on this case, and so we will confine this discussion to those cases which might conceivably have some bearing on the controversy at bar.

Appellant cites:

Bowman v. *Chicago & Northwestern R. Co.*, 125 U. S. 465 (Appellant's brief at 36, 55, 114, 116, 123).

Leisy v. *Hardin*, 135 U. S. 100 (App. brief at 34, 114, 116, 123).

Vance v. *W. A. Vandercook Co.*, 170 U. S. 438 (App. brief at 36).

American Express Co. v. *Iowa*, 196 U. S. 133 (App. brief at 36).

Louisville & Nashville R. R. Co. v. *F. W. Cook Brewing Co.*, 223 U. S. 70 (App. brief at 36, 123).

Adams Express Co. v. *Kentucky*, 206 U. S. 129 (App. brief at 36).

(1) Every one of these cases involved prohibiting the *importation* of intoxicating liquor. (2) *The state from which they were exported had not attempted to control how these liquors were carried and hence these liquors were legitimate objects of commerce.* (3) In every one of these cases, a railway was the means of transportation, while in the present case, the whiskey would be transported over the state highways by motor truck. (4) In none of these cases was the problem of patrolling the roads presented.

The case of *Kirmeyer* v. *Kansas*, 236 U. S. 568 (appellant's brief at 36, 123) was not a case involving transportation by railway, but is subject to all the other distinguishing points above mentioned.

Heyman v. *Hays*, 236 U. S. 178, 59 L. Ed. 527. (App. brief at 37, 44, 63). This case involved an attempt by the State of Tennessee to *tax* exporters of liquors. There was no question of controlling the exportation to prevent diversions into illegal fields. *This case did not even involve the police power* and has no bearing on the present controversy whatsoever.

Appellant also cites:

Michigan Public Utility Comm. v. *Duke*, 266 U. S. 570, 69 L. Ed. 445 (App. brief at 38, 44, 68, 120, 123).

Frost Trucking Co. v. *Railroad Commission*, 271 U. S. 583, 70 L. Ed. 1101 (App. brief at 69, 91, 92, 103).

These cases differ from the case at bar in that they involve statutes attempting to require all contract carriers to secure certificates of convenience and necessity. In the case at bar no such attempt is made. The business of a contract carrier is not affected except as to the transportation of one product. Suppose for example, that Kentucky had passed a law prohibiting all sales of liquors, would not contract carriers be affected in exactly the same way as the present law affects them? Or could it be said that a contract carrier had any reasonable objection to the statute in question in *Clason* v. *Indiana*, 306 U. S. 439, 83 L. Ed. (Adv. Ops.) 599, wherein the transportation of dead animals was prohibited to all save certain transporters licensed by the State Veterinarian?

Appellant further cites:

Buck v. *Kuykendall*, 267 U. S. 307, 69 L. Ed. 623 (App. brief at 46, 47, 91, 120, 123).

Bush & Sons v. Maloy, 267 U. S. 317, 69 L. Ed. 627 (App. brief at 47, 120, 123).

Allen v. *Galveston Truck Line Corp.*, 289 U. S. 708, 77 L. Ed. 1463 (App. brief at 48, 120, 123).

All three of these cases were clearly cases which did not involve the regulation of a dangerous commodity or a regulation of the transportation of such a commodity but were attempts to prohibit competition. As was said by

Mr. Justice Brandeis in *Buck* v. *Kuykendall* in speaking of the statute involved in that case:

> "It determines not the manner of use but the persons by whom the highways may be used. It prohibits such use to some persons, while permitting it to others for the same purpose, and in the same manner."
>
> 267 U. S. 307, 315, 69 L. Ed. 623, 627.

The many other cases cited by appellant seem beside the point.

II. THIS ACT DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The appellant, as we have said, is a contract carrier operating from Louisville, Kentucky, to points north of the Ohio River. The act in question does not, as appellant infers, require that appellant transform itself into a common carrier in order to continue business. The business of appellant as a contract carrier in Kentucky is not affected in any way other than that intoxicating liquors may not be transported to or from premises in Kentucky. Outside of this provision the appellant may come into or go out of Kentucky as unhampered as before.

The appellant adopts "sheep's clothing" when it attempts to play the role of a carrier prohibited from all transportation because it does not hold a common carrier's certificate. Such is not the case. There is no question but that a state may pass a prohibition law which will render valueless breweries, distilleries, and other property used in that business and that such a law will not be considered as taking property without due process of law. *Mugler* v. *Kansas*, 123 U. S. 623, 664, 31 L. Ed. 205, 211.

> "This interpretation of the Fourteenth Amendment is inadmissible. It cannot be supposed that the states

intended, by adopting that Amendment to impose restraints upon the exercise of their powers for the protection of the safety, health or morals of the community.

"The principle, that no person shall be deprived of life, liberty or property, without due process of law, was embodied in substance, in the constitutions of nearly all, if not all, of the states at the time of the adoption of the Fourteenth Amendment, and it has never been regarded as incompatible with the principle —equally vital, because essential to the peace and safety of society—that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."

Nor can it be doubted that Kentucky might have passed a law which in effect would have prohibited all exports of intoxicating liquors, and that such a law would not have been held violative of the due process clause of the Fourteenth Amendment. *Kidd* v. *Pearson*, 128 U. S. 1, 32 L. Ed. 346. So if Kentucky might prohibit all exportation, which would have affected appellant quite as much as the present act, why cannot this State limit the exportation to a class?

Appellant relies on three cases which we will show have no application to the case at bar:

Michigan Public Utility Comm. v. *Duke*, 266 U. S. 570, 69 L. Ed. 445 (App. brief at 68).

This case involved *an attempt by the State of Michigan to make all contract carriers become common carriers.* No such attempt is made under this Kentucky law. All contract carriers may continue to operate unhampered save that they may not haul intoxicating liquors unless they comply with the provisions prescribed in this act.

Frost Trucking Co. v. *Railroad Commission*, 271 U. S. 583, 70 L. Ed. 1101 (App. brief at 69).

Again, we have a case wherein a state attempted to make all carriers become common carriers. The avowed purpose of the act was to control competitive conditions. Neither of these factors appear in this present controversy.

Smith v. *Cahoon*, 283 U. S. 553, 75 L. Ed. 1264 (App. brief at 72).

This case may be distinguished on exactly the same grounds as the *Duke* and *Frost* cases. This was another attempt of a state to require all carriers to become common carriers.

III. THE ACT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

Appellant complains that it is denied equal protection because a truck common carrier is allowed to secure a liquor transporter's license while a truck contract carrier is not accorded that privilege and hence may not transport distilled spirits and wine to or from premises in Kentucky for hire.

We have already stated with great particularity in our introductory Statement the reasons for this classification and so we feel that it is not necessary to repeat what has been said. To counsel for appellees it seems that the difference between operating on schedule on a fixed route, between definite termini and operating at any time on any road between any termini is the ground for classifying these carriers. It is manifestly easier to patrol intoxicating liquors being taken over known routes by a limited number of carriers. See *Clark* v. *State*, — Tenn. —, 113 S. W. (2d) 374.

We have already pointed out that the Commonwealth of Kentucky could by complete prohibition, prevent the

transportation of any such liquors to or from Kentucky premises. Surely a lesser degree of regulation than total prohibition is permissible.

The classification is based upon distinctions which the General Assembly of Kentucky thought bore a relation to the problem of controlling this traffic. As this court has said:

> "The extent to which, as means, they conduce to that end, the degree of their efficiency, the closeness of their relation to the end sought to be attained, are matters addressed to the judgment of the legislature and not to that of the courts. It is enough if it can be seen that in any degree, or under any reasonably conceivable circumstances, there is an actual relation between the means and the end.
>
> "Does the required relation here exist between the condition imposed and the end sought? We think it does. But in any event, if the legislature so concluded, as it evidently did, that conclusion must stand, since we are not able to say that in reaching it that body was manifestly wrong."
>
> *Stephenson* v. *Binford*, 287 U. S. 251, 272, 77 L. Ed. 288, 298.

Appellees might point out that this control law provides for "Field Representatives" who "shall have full police powers such as are now vested in sheriffs and other peace officers." (Section 9, Chapter 2, Acts of 1938, Section 2554b-105, Baldwin's 1938 Kentucky Statute Supplement.) There are now over fifty of these officers serving the Commonwealth whose duty it is to make effective the provisions of this Act.

> "That the Fourteenth Amendment was not intended to and does not strip the states of the power to exert their lawful police authority is settled and requires no reference to authorities. And it is equally settled—as

we shall hereafter take occasion to show—as the essential result of the elementary doctrine that the equal protection of the law clause does not restrain the normal exercise of governmental power, but only abuse in the exertion of such authority, therefore that clause is not offended against simply because as the result of the exercise of the power to classify some inequality may be occasioned. That is to say, as the power to classify is not taken away by the operation of the equal protection of the law clause, a wide scope of legislative discretion may be exerted in classifying without conflicting with the constitutional prohibition."

Louisville & Nashville R. R. Co. v. *Melton*, 218 U. S. 36, 52, 54 L. Ed. 921, 928.

This Court has held that where a particular article or traffic creates a special hazard, then special laws designed to police the article or traffic may be adopted by a state. *South Carolina Highway Department* v. *Barnwell Bros.*, 303 U. S. 177, 82 L. Ed. 734; *Morf* v. *Bingaman*, 298 U. S. 407, 80 L. Ed. 1245. And as we have already shown that the traffic in intoxicating liquors does produce special hazards, there seems to be no question but that steps taken by Kentucky to alleviate the dangers are valid if they bear some "reasonably conceivable" relation to this desired end.

IV. THE CONSTITUTIONALITY OF THE PENALTIES PROVIDED IN THE CONTROL LAW.

Appellant makes the further contention that this Alcoholic Beverage Control Law is invalid under both the due process and the equal protection clauses of the Fourteenth Amendment because the penalties prescribed are so severe as to preclude resort to the courts in the ordinary course to secure a judicial review of the validity of the Control Law.

Appellees would like to point out that this case arises out of an action in equity seeking to enjoin the officers of the Commonwealth of Kentucky from enforcing and from attempting to enforce provision of this alcoholic beverage control law relating to transportation. *There has been no attempt to enforce, as against appellant the penalties provided in this act* and the penalty provisions are separable from the sections regulating the traffic and transportation in alcoholic beverages. Section 120, Chapter 2, Acts of 1938 (Section 2554b-221, Baldwin's 1938 Kentucky Statute Supplement) reads as follows:

> "The titles, articles, sections, sub-sections and all provisions of this Act are severable, and if any of its titles, articles, sections, sub-sections, provisions or the application thereof shall be held unconstitutional, such title, article, section, sub-section, provision or application thereof held to be invalid may be rejected without affecting the remainder of the Act, and the decisions of the courts shall not affect or impair the remaining titles, articles, sections, sub-sections, provisions of this Act or the application thereof. It is hereby declared to be the Legislative intent that this Act would have been adopted had not such unconstitutional title, article, section, sub-section or provision been included therein. It is hereby further declared to be the Legislature's intention in enacting this Act that each title, article, section, sub-section and provision would have been enacted separately, except that if any provision of section 16 of this Act is held to be invalid that entire section shall be construed to be invalid."

This Court has already said:

> "It is contended by appellants that the statute is void upon its face because the severity of the penalties preclude an appeal to the courts against its provisions except at such risks and costs that they should not be compelled to incur, and *Ex Parte Young*, 209 U. S. 123, is adduced. But the provision for penalties is in a section by itself and when their enforcement is

attempted their constitutionality can then be determined. *Minnesota Rate Cases*, 230 U. S. 352; *Louisville & Nashville R. R. Co.* v. *Garrett*, ante, page 298."

Grand Trunk Ry. Co. v. *Michigan Railroad Commission*, 231 U. S. 457, 473, 58 L. Ed. 310, 319; see also: *Phoenix Railway Co.* v. *Geary, et al.*, 239 U. S. 277, 60 L. Ed. 287.

So appellees, in this present controversy, contend that *when the enforcement of the penalties provided in the Alcoholic Beverage Control Law is attempted, then the constitutionality thereof can be determined,* but until that time it is not necessary to make such a determination. Even if the penalty provisions were invalid, this would not affect the validity of the separate provisions relating to transportation.

In support of this argument, appellant cites:

Cotting v. *Godard*, 183 U. S. 79, 46 L. Ed. 92 (App. brief at 81).

Ex Parte Young, 209 U. S. 123, 52 L. Ed. 714 (App. brief at 82).

Southwestern Tel. & Tel. Co. v. *Danaher*, 238 U. S. 482, 59 L. Ed. 1419 (App. brief at 84).

Oklahoma Operating Co. v. *Love*, 252 U. S. 331, 64 L. Ed. 596 (App. brief at 84).

Oklahoma Gin Co. v. *Oklahoma*, 252 U. S. 339, 64 L. Ed. 600 (App. brief at 85).

Natural Gas Pipe Line Co. v. *Slattery*, 302 U. S. 300, 82 L. Ed. 276 (App. brief at 85).

These cases do not proceed upon the idea that there is any want of power to prescribe penalties heavy enough to compel obedience to *legislative acts.* These cases are all based upon the principle that penalties cannot be collected if they deter an interested party from testing the validity

of *legislative rates or orders legislative in their nature.* See: *Wadley Southern Railway Co.* v. *Georgia*, 235 U. S. 651, 59 L. Ed. 405.

As was said in *Ex Parte Young*, 209 U. S. 123, 147, 52 L. Ed. 714, 724:

> "Ordinarily, a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the legislature is complete in any event. In the case, however of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful, he must suffer imprisonment and pay fines as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question, whether the rates as provided by the acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact, which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation and over which the jurisdiction of the legislature is complete in any event."

The statutes now in question make it a crime punishable by fine of not less than $100.00 and not to exceed $5000.00 or by imprisonment not to exceed five years, or by both such fine and imprisonment, to transport over Ken-

tucky roads over three gallons of distilled spirits and wine to or from Kentucky premises without a license. This is a quite different statute from one giving a commission the power to make *rates or orders* and providing a penalty for the enforcement thereof.

In every case cited by appellant, *a rate or commission's order was to be enforced by a severe penalty, and the order could only be tested by disobeying it.* Seemingly this doctrine *is or should be* confined solely to those fields and should not be carried over into the field of ordinary criminal penalties for the breach of a criminal statute. To hold otherwise would, by analogy, invalidate every criminal statute passed by the General Assemblies of the Commonwealth of Kentucky, for in no statute has a special provision been made to allow a "contemplating law violator" the right to test the validity of the criminal statute prior to his breach of said law.

If, however, appellees should be in error as to the scope of this doctrine and if this Court be of the opinion that the penalty in question be such a deterrant to the questioning of the validity of the statute as to be unconstitutional, still appellees insist that as the operation of the penalty provisions could have been suspended by injunction, an opportunity thus was afforded for safely testing the validity of the statute. See *St. Louis, I. Mt. & So. Ry. Co.* v. *Williams*, 251 U. S. 63, 64 L. Ed. 139; *Phoenix Railway Company* v. *Geary*, 239 U. S. 277, 60 L. Ed. 287; *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, 64 L. Ed. 596.

Other provisions of this same act have been questioned before in the Kentucky Court of Appeals and during the pendency of these actions the plaintiffs have operated under injunctions and restraining orders issued by Kentucky Courts. *Beacon Liquors* v. *J. W. Martin, et al.*,

— Ky. —, — S. W. (2d) —; *Keller* v. *Kentucky Alcoholic Beverage Control Board*, 279 Ky. (Adv. Sheets) 272, 130 S. W. (2d) (Adv. Sheets) 821. Thus the Kentucky courts do grant injunctions pending a suit *questioning the constitutionality* of this Alcoholic Beverage Control Law.

The appellant's counsel have misinterpreted the law when they intimate that the privilege of seeking by injunction to test the constitutionality of an act, has been taken away. This is not the case as evidenced by the two Kentucky cases mentioned. Injunctions are prohibited only on an appeal from the Board's action involving exercise of discretion in connection with which there would be no question of the constitutionality of the statute. When the constitutionality of a statute is involved, the legislature has no authority to limit the attack thereon, nor has this been attempted. The only limit is that upon the *appeal* from the Board's action to the courts.

> "Here it does not appear that the carrier had not been afforded an adequate opportunity for safely testing the validity of the rate or that its deviation therefrom proceeded from any belief that the rate was invalid. On the contrary, it is practically conceded—and we judicially know—that *if the carrier really regarded the rate as confiscatory, the way was open to secure a determination of that question by a suit in equity, against the Railroad Commission of the State, during the pendency of which the operation of the penalty provision could have been suspended by injunction.*" (Emphasis Ours.) *St. Louis, I. Mt. & So. Ry. Co.* v. *Williams*, 251 U. S. 63, 65, 64 L. Ed. 139, 140.

In the present case this court must judicially know that this appellant secured a temporary restraining order pending the decision of the specially constituted Three-Judge District Court and is now operating under a temporary

injunction pending the decision of this Supreme Court. It seems perfectly apparent that the appellant has had an adequate opportunity safely to test the validity of this statute. Again it would seem that, as to appellant, the constitutionality of these penalties is moot.

Finally we think it proper to quote a portion of Lockwood, Maw & Rosenberry, *The Use of the Federal Injunction*, 43 Harv. Law Rev. 426, 436, in speaking of regulatory statutes:

> "The essential differences between this type of legislation and the tax statutes which have just been considered are two. This legislation imposes a duty of continued action or inaction vastly increasing the burden of protracted litigation; it also affects far more closely a class of persons who may and are intended to benefit from its provisions. Like the tax statutes, there is almost invariably to be found some inducement to obedience in the form of a penalty or provision for summary forfeiture.
>
> "Those embraced within the terms of a statute of this type find themselves subjected to a burdensome limitation on their freedom of conduct, existing and effective independently of any action at law to enforce it, as to the validity of which no test may be had at law in the absence of a breach of its provisions. The very assumption is of voluntary obedience, and a court of law does not give redress for injuries voluntarily incurred. There remains but two ways of testing the statute at law: a single breach followed by obedience, or complete disobedience, until the final determination of its validity.
>
> "The first possibility forces the contestant to risk the loss of the penalty, if he loses the suit, and the loss flowing from obedience even if he wins. In the one case, he pays a high price, to which the state has no particularly meritorious claim; in the other, he suffers a loss which the decision of the court will have estab-

lished to be unjust. The second possibility of continued disobedience involves a vast accumulation of penalties, mounting constantly as the litigation proceeds. Either makes a case even stronger than the tax cases for the intervention of equity, which can enjoin the collection of the penalties regardless of its decision on the merits.

"But conversely, the evil consequences of postponing performance of the statutory obligation will be measurably greater, entailing suspension of measures deemed essential by the state for the public good. As in rate cases, no form of compensation known to the law can make whole this injury to the state, if the injunction proves to have been improvidently granted. And in most instances, those in whose behalf the legislation was adopted can likewise receive no return for the benefits which they have lost. An injunction may make possible the continued subjection of the buying public to a forbidden form of food, with no recourse to any who have purchased and eaten it except for injury proximately resulting; or it may foist upon the community for a long period undesirable occupations or undesirable practitioners of desirable ones. Evils of this sort no bond or other security can remedy. But it seems impossible to say more than that the burden of loss incident to the time necessary for the law to take its course must fall one way or the other; there is no way to prevent its falling. The possibility of a serious loss to the owner of a business or a practitioner of a profession must be weighed against the possibility of injury to the public, and the declaration of policy by the state must be given the weight it deserves. Rules cannot be formulated which will serve to solve the difficulties. The lack of a more perfect solution may not be made a criticism of equity, since no better one may be offered. Rather again, it is a case for the exercise of the sound discretion of the chancellor."

(Footnotes omitted.)

CONCLUSION

It has been the endeavor of appellees to call to this Court's attention decisions holding statutes valid which more vitally affected interstate commerce than does the statute in question, such as the licensing of all railroad engineers (*N., C. & St. L. Ry. Co.* v. *Ala.*, supra); prohibition of the running of freight trains on Sunday (*Hennington* v. *Georgia*, supra); requiring "full crews" on trains (*C., R. I. & P. Ry. Co.* v. *Ark.*, supra); regulation of motor caravans (*Morf* v. *Bingaman*, supra); regulating the weight of trucks running over the highway (*South Carolina Highway Dept.* v. *Barnwell Bros.*, supra); prohibition of healthy people entering certain areas (*Compagnie Francaise* v. *Board of Health*, supra); prohibition of the transportation of certain quantities of gasoline over the streets (*Ash* v. *Gibson*, supra); regulation of tug boats engaged in interstate commerce (*Kelly* v. *Washington*, supra); regulation of the importation of coal by truck (*Yager* v. *State*, supra); limitation of the transportation of dead animals to those licensed to carry them and prohibiting all exportation (*Clason* v. *Indiana*, supra); the prohibition of the shipment of certain citrus fruits out of a state (*Sligh* v. *Kirkwood*, supra).

We have pointed out decisions limiting the exportation of intoxicating liquors to common carriers or the manufacturer thereof (*Clark* v. *State*, supra), and requiring a license of all who transported such liquors by truck (*Commonwealth* v. *One Dodge Motor Truck*, supra).

We have shown that Congress has not occupied the field, that the Motor Carrier Act of 1935 does not attempt to cover the patrolling of the roads; the correction of certain hazards created by the trucking of certain commodities (*Morf* v. *Bingaman*, supra; *Clason* v. *Indiana*, supra);

nor the regulation of the roads over which carriers may haul (*Bradley* v. *Public Utilities Comm. of Ohio*, supra). The Knox Act was shown only to affect the labeling of packages of liquor. The Federal Alcoholic Administration Act was shown to have no effect and that the only pertinent provisions related to bottling, packaging, and labeling. The Liquor Enforcement Act of 1936 was shown only to apply to the importation of these liquors into dry states.

We have pointed out the decisions of this Court holding that a state may in effect prohibit the exportation of certain commodities, including whiskey, while allowing intrastate commerce (*Kidd* v. *Pearson*, supra; *Geer* v. *Connecticut*, supra; *Hudson County Water Co.* v. *McCarter*, supra; *Sligh* v. *Kirkwood*, supra; and *Clason* v. *Indiana*, supra), and cited opinions holding that the power to prohibit includes the lesser power to regulate. *Seaboard Air Line* v. *North Carolina*, supra; *Davis* v. *Mass.*, supra; *Rippey* v. *Texas*, supra; *State Board* v. *Young's Market*, supra; and *Eberle* v. *Michigan*, supra; *Commonwealth* v. *One Dodge Motor Truck*, supra; *Jefferson County Distillery Co.* v. *Clifton*, supra; and *Clark* v. *State*, supra. We have shown that the state may control the use of its roads to simplify the policing and to reduce hazards. (*South Carolina State Highway Dept.* v. *Barnwell Bros.*, supra; *Morf* v. *Bingaman*, supra) and have pointed out that the trucking of whiskies creates a special hazard on our roads due to "bootlegging" and "hijacking."

It has been pointed out that this act affects these liquors before physical movement begins in commerce of any kind.

Further it has been shown that there is no property taken without due process (*Mugler* v. *Kansas*, supra; *Kidd* v. *Pearson*, supra), and that there is no violation of the equal protection clause. *Stephenson* v. *Binford*, supra;

Louisville & Nashville R. R. Co. v. *Melton,* supra; *Clark* v. *State,* supra.

We have addressed ourselves to the constitutionality of the penalty provisions, showing that these penalty provisions are separate and that until the attempted enforcement of these provisions, their constitutionality is moot, as to this case (*Grand Trunk Ry. Co.* v. *Michigan Railroad Commission,* supra). We have also attempted to show that the constitutionality of these penalty provisions is obvious (*Ex Parte Young,* supra), because they are ordinary criminal penalties for violation of the law. Finally it was shown that the penalty could have been enjoined (*St. Louis I. Mt. & So. Ry. Co.* v. *Williams,* supra; *Phoenix Ry. Co.* v. *Geary,* supra; *Oklahoma Operating Co.* v. *Love,* supra), and so there is no basis for determining the penalty to be a deterrant to anyone testing the validity of the transportation provisions of this "Control Law."

Despite the attempts of appellant to infer otherwise, the statute in question in no way affects the status of contract carriers, save as to transportation of intoxicating liquors. Contract carriers may come into and go from Kentucky just as freely as they did before the passage of this act. There is no deep purpose to convert all carriers into common carriers as was apparent in *Smith* v. *Cahoon,* supra; *Michigan Public Util. Comm.* v. *Duke,* supra; *Frost Trucking Co.* v. *Railroad Commission,* supra. All that is apparent is an honest attempt to control the traffic in a commodity dangerous to health and morals. Nor can it be said that there is a deliberate attempt to control interstate commerce. Instead, the manifest purpose of this statute is to channelize the transportation of these products.

Of what use would be the control of the manufacturing or sales in those commodities, if no control could be exer-

cised over the distribution? It is no answer to say the absence of federal legislation infers an unhampered right to transport, free of all state restrictions. What could be worse than a situation where the state was powerless to protect itself against the evils of certain commodities concerning which Congress has not legislated and which were supposedly destined for another state. The Commerce Clause was never intended to render a state helpless against known evils masquerading under its banner. Instead, it has been clearly manifested by this court that a state may protect itself from commodities demanding regulation. *Clason* v. *Indiana*, supra; *Sligh* v. *Kirkwood*, supra.

In order to protect its people a state must have the power to guard against evils which are peculiarly local and hence not covered by federal legislation. The problem of preventing the diversion of whiskey which has been manufactured in the state is one which is peculiarly Kentucky's. As we have pointed out, Kentucky has millions of gallons of these liquors stored within her bounds, and thus her problem differs from that of other states whose problem it is to prevent illegal importation.

> "Indeed, it is a principle fully recognized by decisions of state and federal courts that wherever there is any business in which, either from the products created or the instrumentalities used, there is danger to life or property, it is not only within the power of the States, but it is among their plain duties, to make provision against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far as is practicable."
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> *Nashville, Chattanooga & St. L. Ry. Co.* v. *Ala.*, 128 U. S. 96, 100, 32 L. Ed. 352, 354.

Again this Court has said:

> "Local laws of the character mentioned have their source in the powers which the States reserved and never surrendered to Congress, of providing for the public health, the public morals and the public safety, and are not, within the meaning of the Constitution, and considered in their own nature, regulations of interstate commerce simply because, for a limited time or to a limited extent, they cover the field occupied by those engaged in such commerce."

Hennington v. *Georgia*, 163 U. S. 299, 317, 41 L. Ed. 166, 174.

We submit that it is the duty of this state to protect its citizens from the chaotic flood the 192,352,572 gallons of whiskey stored in Kentucky would cause if not channelized and controlled, and that:

> "The failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for the cases within the scope of its power, the rule of the state law, which until displaced, covers the subject."

Smith v. *Alabama*, 124 U. S. 465, 477, 31 L. Ed. 508, 512.

Respectfully submitted,

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